Supreme Court, U.S.
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No. 98-802

In the Supreme Court of the United States

OCTOBER TERM, 1998

SHAMROCK FARMS COMPANY
and SHAMROCK FOODS COMPANY,
Petitioners,

v.

ANN M. VENEMAN, Secretary, Department of Food & Agriculture, State of California, and RICHARD TATE, Chief, Milk and Dairy Food Control Branch, Division of Animal Industry, Department of Food and Agriculture, State of California,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The brief in opposition in this case entirely fails to engage the issue presented in the petition. The State does not deny that the question raised in the petition is an important and recurring one. The State does not deny that its milk composition and pricing regime effectively excludes out-of-state competitors from California's market and, as a consequence, already has created tension between the States. And California does not deny that the Ninth Circuit's use of legislative history is irreconcilable with this Court's application of the "clear statement" rule that applies under the Commerce Clause and in related areas of the law.

Instead, the State raises two central points in arguing against review of the decision below. First, it asserts that a state court has determined that California's system does not burden interstate commerce, that this state-court determination will have res judicata effect in future federal proceedings, and that the dispute in this action about Commerce Clause standards accordingly has been rendered moot. Second, the State contends that the language of Section 144 of the Farm Bill is clear enough to satisfy the test set out by this Court. Both of these contentions are insubstantial.

A. Pending State-Court Litigation Has No Bearing Here

The State asserts at several points in its opposition that, "[f]ollowing a full trial on the merits in a related action earlier this year, a state court squarely ruled" that there is "'no credible evidence that there was any burden on interstate commerce as a result of the statutory requirement ... and enforcement of the compositional standards.'" Br. in Opp. 1-2 (quoting Br. in Opp. App. 4) (ellipses in original). See *id.* at 10, 18-19. The State goes on to declare that this state-court "judgment in all likelihood will be final and res judicata before this Court would even hear the question purportedly presented for certiorari. This Court's decision thus would likely have no impact upon the ultimate outcome of Petitioners' case." *Id.* at 2. See *id.* at 18-19.

This assertion, however, may generously be characterized as misleading in the extreme. The purportedly "related action" mentioned by California is the state enforcement proceeding described in the petition (at 5 n.1). In its answer to the State's complaint in that proceeding, Shamrock did advance the argument

that the composition requirements violate the Commerce Clause. But the State, in response, contended that the federal district court's decision in *this* case should be given res judicata effect *in the state proceeding*; the State maintained that "[t]he United States District Court has upheld the constitutionality of the state milk compositional standards" and that "[t]his [federal] decision precludes any state court litigation on the constitutional issues determined thereby." *People of the State of California* v. *Shamrock Foods Co.*, No. 702204 (Cal. Super Ct., San Diego Cty.), Pl. Mem. of Points and Authorities in Opp. to Def. Mot. to Stay Action 3. See *id.* at 4 ("the federal court's decision upholding the constitutionality of the milk compositional standards is binding on this court").[1] See also *Stoll* v. *Gottlieb*, 305 U.S. 165, 170 (1938). Shamrock did not take issue with this argument and abandoned its state-court Commerce Clause defense, so that the Commerce Clause issue was not litigated on the merits in the state enforcement proceeding. After the state judge indicated that he would rule for California on the state-law questions at issue in that proceeding, the State's attorneys prepared an order for the judge's signature (see Cal. Super. Ct. R. 232(a)), and they gratuitously included in that order the supposed finding that the State now relies upon in its opposition to the petition. But that "finding" was irrelevant to any issue actually litigated in the state civil penalties proceeding.

In this setting, California plainly cannot bootstrap the language that it placed in the state court's order into a bar to further litigation of the federal constitutional issue in this case. In the best of circumstances, the state court's dictum on an issue that was not

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[1] The State also declared that "[t]he collateral estoppel doctrine precludes Shamrock from relitigating issues that were litigated and decided in the federal court action." California went on to state that the federal court had upheld the constitutionality of the composition standards and also had held that "[t]hese milk standards, as operated and enforced by the State of California, in conjunction with reduced milk prices, allowances, or other competitive credits to California processors, but not to out-of-state processors, * * * does not violate the Commerce Clause." Pl. Mot. in Limine No. 3, at 4. The State therefore took the position that those issues could not be the subject of further litigation in the California courts. *Ibid.*

litigated cannot have preclusive effect. And more fundamentally, the State successfully contended that the federal district court's decision precluded consideration of the Commerce Clause question in state court; having succeeded with that argument, the State cannot now argue that the state court's judgment should estop the next phase of the federal litigation. See, *e.g.*, *Montana* v. *United States*, 440 U.S. 147, 164 & n.11 (1979); RESTATEMENT (SECOND) OF JUDGMENTS § 28 & cmt. j (1980). The state-court order cited by California therefore has no bearing on whether review in this Court is appropriate.

It may be added that the State's contention would lack merit even if California were not trying to play a preclusion shell game between the state and federal courts. The state court "finding" does not articulate any legal standard to give meaning to its reference to "burden[s]" on interstate commerce. And the state-court order cited by California purports to find only that there is no evidence "that there was any burden on interstate commerce as a result of the statutory requirement of application and enforcement of the *compositional standards* set out in Food & Agriculture Code, sections 32911, 35784, 38181, and 38211." Br. in Opp. App. 4 (emphasis added). On the face of it, that purported finding says nothing about the *pricing and pooling laws* that also are challenged in this case. As we explain in the petition — and as the State pointedly does not deny — it is the combination of those laws and the composition requirements that makes it effectively impossible for out-of-state producers to compete in the California market. The proof of the pudding here is in the undisputed market reality: more than 90% of the fluid milk sold elsewhere does not satisfy California's standard, while only one per cent of California's milk now comes from out-of-state sources. See Pet. 3, 28. The state court could not, and did not purport to, find that this discriminatory system has no adverse impact on interstate commerce.[2]

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[2] California asserts at various points that its "fluid milk standards apply evenhandedly to both in-state and out-of-state milk." Br. in Opp. 10. See *id.* at 3, 18. But it is, of course, the discriminatory *fortification allowance*, in combination with the facially neutral composition standards, that effectively excludes out-of-state milk from the California market. On this point, California's only response

B. The Composition Requirements

The State has remarkably little to say about the issue that actually is presented in the petition: whether the court of appeals' analysis can be reconciled with this Court's insistence that Congress speak with unambiguous clarity when it abrogates the dormant Commerce Clause. The State argues principally that the Ninth Circuit's holding was faithful to this Court's decisions because the court of appeals quoted a snippet from Justice O'Connor's concurring opinion in *C&A Carbone, Inc.* v. *Town of Clarkstown*, 510 U.S. 383 (1994). See Br. in Opp. 9, 11. But if the court of appeals' understanding of the governing test is flawed, it cannot insulate its decision from review by mumbling a few of the proper words during the course of its opinion. That manifestly is what happened here.

1. We argued in the petition that the Ninth Circuit's cavalier approach to the question whether Congress spoke with the necessary clarity — in which the court concluded that "[t]he requisite intent may be gleaned both from the language of the relevant statute and from the legislative history" (Pet. App. 6a) — is a dangerous departure from this Court's precedents. As we explained (at 12-14), the language of Section 144 simply cannot support the conclusion "that Congress affirmatively contemplated

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appears to be the suggestion that Shamrock should complain to Arizona (or federal) authorities, who could provide Shamrock with a fortification allowance that would allow it to compete in California. *Id.* at 4-5 n.5. It has long been settled, however, that, a State may not force other States to respond to its discriminatory laws in an effort to preserve competition. See, *e.g.*, *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U.S. 573, 582-584 (1986). In any event, the court of appeals assumed for purposes of its decision that "California processors receive a competitive advantage against out-of-state processors because California only gives the fortification allowance to in-state processors," and that "California's milk composition standards and pricing and pooling laws are violative of the Commerce Clause because they prohibit the free flow of milk products across state lines." Pet. App. 3a. That assumption (which is quite correct) must be accepted for present purposes.

otherwise invalid state legislation." *South-Central Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 91 (1984). The statute refers to "*this Act* or any *other* provision of law," which is most naturally read to encompass only federal *statutes*. Section 144 directs that the relevant provisions of law not be "construed" to diminish California's authority, which is not the formulation that Congress would choose if it meant to abrogate *constitutional* limitations. And Congress's usual approach is to refer expressly to the "*Constitution* and laws" of the United States when it means to reach both sources of authority. The State's brief makes *no response at all* to any of these points.

Instead, in its notably abbreviated defense of the Ninth Circuit's holding, the State asserts that Section 144 must be understood to abrogate the Commerce Clause because "the statute does not simply bar preemption: 'Rather, it states that no provision of law shall "preempt, prohibit, or otherwise limit" California's milk laws or regulations.'" Br. in Opp. 12 (quoting Pet. App. 7a). But this formulation is best read to provide only that federal statutes should not be construed to displace California's standards with federal labeling requirements, to outright prohibit California's program, or otherwise to restrict the state regime; it nowhere even suggests the requisite "unambiguous statement of congressional intent * * * 'to alter the limits of state power otherwise imposed by the Commerce Clause.'" *Maine* v. *Taylor*, 477 U.S. 131, 139 (1986) (citation omitted). The State's only other argument in support of the composition requirements is its assertion that Congress was aware of California's milk standards at the time Section 144 was enacted. Br. in Opp. 13. But this assertion, even if true, is wholly beside the point: that Congress knew of the state standards and wanted to save them from preemption says nothing at all about whether Congress took the further, "collective decision" to override the Commerce Clause. *South-Central Timber*, 467 U.S. at 92.[3]

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[3] The State's case is not aided by *Northeast Bancorp, Inc.* v. *Board of Governors*, 472 U.S. 159 (1985), cited at Br. in Opp. 12, 17. There, Congress *itself* had impeded interstate commerce by expressly precluding interstate bank acquisitions unless those transactions were

2. Perhaps because it is able to find so little that is helpful in the statutory language, the State ultimately turns for support to Section 144's legislative history.[4] In doing so, the State accuses us of omitting from the petition the following "critical language" (Br. in Opp. 15) from the Conference Report: "[t]he managers intend for the State of California to be able to fully enforce and apply its fluid milk standards and their attendant labeling requirements."

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authorized by state law. See 472 U.S. at 168, 174. Here, in contrast, the claim is that Congress authorized a *State* to discriminate against interstate commerce. Similarly, California's attempt to distinguish *United Egg Producers* v. *Department of Agric. of the Commonwealth of Puerto Rico*, 77 F.3d 567 (1st Cir. 1996), is unavailing. The State asserts that the statute at issue in *United Egg* "did not (as here) specifically authorize a particular state's laws." Opp. 13. In fact, however, the structures of Section 144 and of the EPIA (the statute at issue in *United Egg*) are quite similar: both statutes authorize state laws only by negative inference. The EPIA provides that no State "other than those in noncontiguous areas of the United States" may require particular labeling (see Pet. 24); Section 144, far from giving California express permission to do anything, provides only that *federal* laws "shall not be construed to preempt, prohibit, or otherwise limit" California's authority.

[4] The State contends at several points that Shamrock makes inconsistent arguments when it contends that legislative history cannot support a finding that Congress abrogated the Commerce Clause, while also pointing to legislative history to establish that Congress did *not* mean to displace constitutional requirements. Br. in Opp. 7, 9, 15, 17. But there is no inconsistency here. Legislative history cannot underlie a finding of abrogation because, absent a clear statement in the statutory text, it is impossible to be confident that Congress made an affirmative, collective decision to override constitutional requirements. See cases cited at Pet. 19-21. For this reason, it always should be possible to resolve cases of this sort without recourse to legislative history or other interpretative aids. But the statutory background and history may help confirm that Congress did *not* intend to override the Constitution — and that is particularly so if ambiguous statutory language of the sort relied upon by the Ninth Circuit ever may be sufficient to support a finding of abrogation.

H.R. Conf. Rep. No. 494, 104th Cong., 2d Sess. 339 (1996). With all respect, however, it is the State's account that is misleading. The report language cited by the State is an elaboration upon the explanation of Section 144 that is offered in the immediately preceding paragraph of the Conference Report, which declared unambiguously that "[t]he conference-adopted bill provides the State of California an exemption from the *preemption provisions* of any federal law respecting standards of identity and labeling for fluid milk." *Id.* at 338 (emphasis added). Read in context, it thus is plain that the conference had in mind only *statutory* preemption, prohibition, or other limits, and never affirmatively considered abrogation of the Commerce Clause.

Indeed, as we explained in the petition, that conclusion is supported by the entirety of Section 144's background. We noted that the hearings and floor debate that preceded enactment of the provision focused exclusively on the preemptive effect of the NLEA, and that the only reference to the Commerce Clause in Section 144's legislative history stated that the provision would *not* abrogate dormant Commerce Clause restrictions. Pet. 15-17. Again, the State makes *no response at all* to this point.

C. The Pricing And Pooling Provisions

The State also has virtually nothing to say in defense of the Ninth Circuit's holding that Congress authorized California's discriminatory pricing and pooling laws. The State largely contents itself with the blithe assertion that the court of appeals found those laws saved by "Congress' intention to prohibit indirect limitations on the state authority to enact * * * laws * * * regarding California's milk standards." Br. in Opp. 16. But the State ignores the analysis that the Ninth Circuit used to reach that conclusion. In fact, as the State elliptically recognizes (*id.* at 17), the court of appeals relied on legislative history; the State hardly could contend otherwise when the Ninth Circuit itself declared that it is "important to consider the legislative history" because "the pricing and pooling laws are not specifically referenced in the statute" (Pet. App. 10a n.2), and went on to use legislative history to "demonstrate[] that Congress intended the milk pricing and pooling scheme be included in [Section 144's] exemption." *Id.* at 10a. We explained in the petition (at 18-21), however, that this

Court has forcefully *rejected* reliance on legislative history in cases where a clear statement of congressional intent must be found — and Justice O'Connor made that very point in *Carbone* (see *id.* at 21), the decision cited by California as stating the controlling standard. See Br. in Opp. 11. Once again, the State makes *no response at all* to this point.

The State does make much of Shamrock's supposed concession below that the composition standards are linked to the pricing and pooling laws. Opp. 16. Of course, we recognize that California intends the two types of provisions to work together; it is the combination of the composition requirements and the discriminatory fortification allowance that the State uses to exclude out-of-state competitors from California's market. Our acknowledgment of that point during the course of this litigation, however, hardly means that Congress acted with the clarity necessary to authorize discriminatory pricing laws. Even assuming that Congress meant to abrogate the Commerce Clause as to the composition requirements, nothing in the statutory text suggests (let alone demonstrates with unmistakable clarity) that Congress also focused on, or even was aware of the existence of, discriminatory pricing laws. And to the extent that legislative history is regarded as relevant here, the asserted connection between the composition standards and the fortification allowance *never* was called to Congress's attention during consideration of Section 144. See Pet. 22 n.9.

In this regard, the State simply misses the point when it declares that Congress need not expressly identify particular state laws that it means to preserve from Commerce Clause attack. Br. in Opp. 17. We agree with that observation. But the State disregards our real contention: Congress "must be unmistakably clear" in identifying the *category* of state laws that it intends to authorize. *South-Central Timber*, 467 U.S. at 91. If that were not the rule, courts inevitably would have to base Commerce Clause decisions on "mere speculation as to what Congress 'probably had in mind.'" *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 343 (1982). And here, given the indefinite nature of the statutory text relied upon by California and the Ninth Circuit, the court of appeals' holding rests on precisely that sort of speculation.

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Against this background, there can be no serious doubt that the court of appeals erred in holding that Congress meant Section 144 to abrogate the Commerce Clause. The court ignored elements of the statutory text indicating that Congress did not mean to displace Commerce Clause requirements; it disregarded the congressional practice of separately addressing constitutional and statutory provisions; and it misread Section 144's legislative history. In this setting, the only real question is whether the Ninth Circuit's error warrants review by this Court. In our view, it plainly does.

As applied by the Ninth Circuit, the Commerce Clause "clear statement" rule does not differ from any ordinary exercise in statutory construction. The court explicitly held that congressional intent in this context may be "gleaned" from legislative history. Pet. App. 6a, 10a & n.2. And the court found the statutory text to abrogate the Commerce Clause even though Section 144's language does not expressly advert to the Clause, does not affirmatively authorize California to enact particular types of laws, and may reasonably be read as insulating California law only from federal statutory limitations. If not set aside, this holding will encourage litigation about the meaning of ambiguous federal statutes and will lead to the validation of state laws that discriminate against interstate commerce — even where Congress intended no such result. At the same time, as we noted in the petition (at 11, 19-21), the Ninth Circuit's approach throws into confusion the "clear statement" rules that govern in other important areas of the law.

Further review is particularly important because the holding below has significant implications both for congressional drafting practices and for relations between the States. It is essential that Congress have "a predictable background rule against which to legislate" (*Landgraf* v. *USI Film Products*, 511 U.S. 244, 273 (1994)) so that it knows whether particular statutory formulations will be held to abrogate the Commerce Clause. The Ninth Circuit's holding, however, creates considerable confusion about the clarity of the statements that are required to authorize state restrictions on interstate commerce. It will leave legislators in doubt about the kind of language that is necessary to override dormant Commerce Clause requirements; it may well lead members of Congress to conclude

that ambiguous statements suffice to abrogate the Clause; and it will offer courts no way to determine what Congress intended when its selection of ambiguous language post-dated the decision below.

At the same time, because Section 144 surely does not represent "a collective decision" by Congress to set aside constitutional requirements, the court of appeals' decision means that out-of-state, "unrepresented interests will be adversely affected by [California's] restraints on commerce." *South-Central Timber*, 467 U.S. at 92. The inevitable result will be the generation of considerable friction between States. Indeed, Arizona and Iowa recently filed a brief supporting Shamrock in its state-court enforcement proceeding, complaining that "the erection of trade walls around one State (here California) * * * harms other States," creates a regime in which "the ability of out-of-state processors to sell milk in California is virtually extinguished," and injures those States' "agricultural producers, processors, farmers, and consumers." *People of the State of California* v. *Shamrock Foods Co.*, No. D031041 (Cal. App. 4th Dist.), Br. of Amici Curiae, States of Arizona and Iowa, at 2, 3 (Dec. 18, 1998). This Court's obligation to step in when such parochial laws are "'destructive to the harmony of the States'" (*Camps Newfound/Owatonna* v. *Town of Harrison*, 117 S. Ct. 1590, 1595 (1997) (citation omitted)) makes review of the decision below imperative.

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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